

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

LARRY GENE TILCOCK,

Petitioner,

vs.

MICHAEL BUDGE, et al.,

Respondents.

Case No. 3:03-cv-00037-RCJ-RAM

**ORDER**

Before the court are petitioner's application to proceed in forma pauperis (#118), motion for reconsideration (#119), and motion for appointment of counsel (#120). Respondents have filed an opposition to the motion for appointment of counsel (#121) and an opposition to the motion for reconsideration (#122). Petitioner has filed a reply to the state's opposition to the motion for reconsideration (#123).

The current motion for reconsideration repeats petitioner's argument in an earlier motion for reconsideration (#108) and supplement (#113) that actual innocence excuses the procedural default of ground 7 of the first amended petition (#20). The court denied that earlier motion. Order (#114). Repeating the argument does not make it any better.

Furthermore, the argument is not properly before this court. Ground 7 of the first amended petition was a claim that the prosecution used perjured testimony to prove the charge of failure to stop upon the signal of a police officer, and that without such testimony there was insufficient evidence to support a conviction on that charge. When petitioner had presented the same claim in his earlier state habeas corpus petition, the Nevada Supreme Court ruled that it was barred by Nev.

1 Rev. Stat. § 34.810 because he could have raised the claim on direct appeal but did not. This court  
2 then ruled that ground 7 was procedurally defaulted, and it was not persuaded by petitioner's  
3 argument that the ineffective assistance of appellate counsel was cause and prejudice to excuse the  
4 default. Order (#31). In his opposition to the motion to dismiss (#30), petitioner did not argue  
5 actual innocence to excuse the procedural default. Petitioner did not appeal the dismissal of ground  
6 7. By arguing that actual innocence excuses the procedural default of ground 7 now, after all the  
7 appeals have concluded and after this court's judgment is final, the motion for reconsideration is in  
8 effect a second or successive habeas corpus petition. Gonzalez v. Crosby, 545 U.S. 524, 530-32  
9 (2005); Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005). Petitioner needs to obtain  
10 authorization from the court of appeals before he can proceed with a second or successive petition.  
11 28 U.S.C. § 2244(b)(3). The court notes that petitioner has sought and was denied such  
12 authorization in Tilcock v. Budge, Case No. 13-70354.

13 Petitioner's application to proceed in forma pauperis (#118) and motion for appointment of  
14 counsel (#120) are moot because the court is denying the motion for reconsideration (#119).

15 Reasonable jurists would not disagree with this court's conclusions, and the court will not  
16 issue a certificate of appealability.

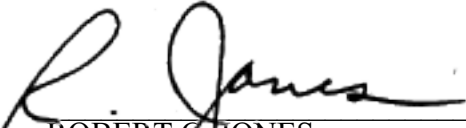
17 IT IS THEREFORE ORDERED that petitioner's motion for reconsideration (#119) is  
18 **DENIED**.

19 IT IS FURTHER ORDERED that petitioner's application to proceed in forma pauperis  
20 (#118) is **DENIED** as moot.

21 IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel (#120) is  
22 **DENIED** as moot.

23 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

24 Dated: October 21, 2014.

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27 ROBERT C. JONES  
28 United States District Judge